

Steven F. Alder, (Bar No. 0033)
Fredric Donaldson, (Bar No. 12076)
Assistant Attorney General
Counsel for Division of Oil, Gas and Mining
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116
Telephone: (801) 538-5348

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**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC

Intervenors,

DIVISION'S RESPONSE TO
PETITIONERS' MOTION FOR
CERTIFICATION OF BOARD
MEMBERS' STATUS CONCERNING
FINANCIAL INTERESTS IN COAL
MINING OPERATIONS AND FOR
RECUSAL OF EACH MEMBER WHO
HOLDS ANY SUCH INTEREST THAT
THE BOARD'S DECISIONS MAY
AFFECT AND MEMORANDUM IN
SUPPORT THEREOF

Docket No. 2009-019
Cause No. C/025/0005

INTRODUCTION

The Division of Oil, Gas, and Mining ("Division"), by and through counsel, hereby submits this Response to Petitioners' Motion for Certification of Board Members' Status Concerning Financial Interests in Coal Mining Operations and for Recusal of Each Member Who Holds Any Such Interest that the Board's Decisions May Affect and Response to the Memorandum in support of the aforementioned Motion.

DISCUSSION

I. Members of the Utah Board of Oil, Gas, and Mining (“Board”) are not prohibited from owning interests in coal mining operations and are not required to certify to Petitioners concerning their financial interests.

Board members are not restricted from owning interests in coal mining operations and related business investments. The Coal Act provisions (Utah Code § 40-10-7(1)) and the regulations (Utah Admin. Code R645-101-121) prohibit employees who perform any duties or functions under the Act from having a direct or indirect financial interest in coal mining and reclamation operations. In the Coal Act the definitions of “employee” states that it “excludes the board” and the definition of “Board” goes to the trouble to add “the board shall not be defined as an employee of the division.” The same extraordinary clarification is contained in the definitions in the regulations R645-100-200. The reason for this care in the definitions is to make it absolutely clear that the restrictions that apply to employees do not apply to board members. In this respect, the definitions of direct and indirect financial interest also take care to limit their scope to “ownership or part ownership *by an employee*” and “any other arrangements *where an employee* may benefit”. (Utah Admin. Code R645-100-200). Board members are not precluded from having a direct or indirect financial interest in coal mining and reclamation activities.

However, board members are required to provide the same disclosure and to sign a statement of employment and financial interests with the Director of the Division of Oil, Gas, and Mining as employees. Utah Admin. Code R. 645-101-300(311, 343.100, 343.110, 343.120). The requirements related to these forms are found in Utah Admin. Code R645-101-300. Each Board member is required to list “all financial interests, including employment, security, real property, creditor and other financial interests held during the course of the preceding year.” Utah Admin. Code R. 645-101-300(341, 341.200). This form and the information provided is

not public information and is protected from disclosure. Board members need not provide the Petitioners with copies of the financial certification.

The Petitioners' request that the Board members be required to certify "that he or she does not have a direct or indirect financial interest in any Utah coal mining operation or in any other coal mining operation that the decision of this Board may affect¹" or recuse himself or herself is an attempt to intimidate and remove board member who were selected due to their experience and knowledge. This overly broad "financial certification" is an invention by the Petitioners that attempts to add a level of disclosure that the Coal Act does not require. No "certification requirement" for board members exists in the Coal Act, the coal rules or the Board's rules of procedure. No requirement exists in the Utah Administrative Procedures Act. Since there is not requirement it would be contrary to the Coal Act to require it.

There are many good reasons why this requirement does not exist. First, it is, by its negative wording, akin to certification that a man does not beat his dog. It implies that if the board members will not so certify they must have a reason and so must be guilty or close to it. Secondly, certification may cause the board member to feel that they will need to risk the burden of defending a declaration and thus to be overly cautious rather than risk being examined for any possible mistake. Such fear of a need to defend could have the effect of intimidating board members into taking undue or unnecessary caution not only in the certification, but in the actual deliberation and consideration of the merits of the hearing. Thirdly, requiring certification may prevent individuals from applying to fill posts on the board that require expertise and experience

¹ The requested certification also is an substantially incorrect statement of the law and the test for recusal as outlined by the rules and the office of surface mining. It is misleading presented as a required affirmation in an attempt to broaden the test that should apply. See point II, *infra*.

in particular industries. Finally, board members should not have a different standard of perceived fairness for coal hearings than they have for other adjudications in other matters.

The status of a board member requires that they be afforded the respect and trust in their integrity and judgment for which they were selected. Board members should not be required to “certify”. The Coal Act does not require it the Petitioners are wrong to suggest it is needed. They are required to recuse themselves when appropriate and that is a sufficient and proper protection of due process and justice.

II. Board members must recuse themselves only if the proceeding would affect their direct or indirect financial interests.

Board members are required to recuse themselves from proceedings that may affect their direct or indirect financial interests. Utah Admin. Code R. 645-101-100(130) (“Members of the Board will recuse themselves from proceedings which may affect their direct or indirect financial interests.”), 30 C.F.R. 705.4(d)². As explained, the regulations that apply to employees being prohibited from certain responsibilities if they have a direct or indirect financial interest in the coal mining are not those that apply to board member recusal³.

The best guidance for board members to use when determining if they are required to recuse themselves is found in the Federal Register explanation of the purpose and intent of the recusal provision and how it is to be applied by multi-interest board members⁴. The examples

² “Members of advisory boards and commissions established in accordance with State laws or regulations to represent multiple interests, who perform a function or duty under the Act [Surface Mining Control and Reclamation Act] shall recuse themselves from proceedings which may affect their direct or indirect financial interests.” 30 C.F.R. 705.4(d).

³ The definitions of direct and indirect financial interests found in the Coal Rules refer to financial interests of “employees” and Board members have been expressly excluded from the definition of employees for the purposes of the coal act. *See* 30 C.F.R. 705.5.

⁴ Federal Register Vol. 51, No. 201 October 17, 1986. A multi-interest board is one where the members are selected to represent special areas of knowledge and expertise such as is required when selecting members of the Utah Board of Oil Gas and Mining.

provided by the Office of Surface Mining in response to comments on the proposed rule provide the best guidance on what may constitute a direct or indirect financial interest and when a Board member's recusal would be required. The example also illustrate that the definitions applied to employees are not intended to apply to board members' recusal decisions. The examples provide some rules that may be useful.

- A direct or indirect financial interest in a company that is party to a proceeding requires recusal. 51 Fed. Reg. 37119 (Oct. 17, 1986) (“a proceeding where one the parties is a coal company, a board or commission member would not have to be recused unless that member has a direct or indirect financial interest in the company which is a party to the proceeding”). Accordingly the Board members should recuse themselves if they or their family members⁵ have an ownership, employment, contract, debt or other financial interest in Alton Coal Development LLC or any affiliated entities.
- Direct head-to-head competition between a permit applicant and a company in which the board member had an financial interest where the decision of the board would affect the interest requires a board member to recuse himself or herself. *Id.* (“In the event that a multi-interest board does act upon a permit application and direct, head-to-head competition exists between a permit applicant and a company in which the board member has an interest, recusal would be necessary if the decision on the permit application could in some way affect the member's

⁵ The definitions of direct and indirect financial interests as applied to employees are informative to the extent that indirect interests are defined to mean those direct interests that are attributed to the employee by virtue of the employees spouse or other family members. Indirect does not mean by virtue of circuitous effects or consequences. A similar meaning of the term “indirect” can apply to recusal for board members as is made clear by other examples set out in the Federal Register.

interest.”). The potential for a competitive effect on a company in which the board member may have an interest is the harder case. However, the example suggests that not all competitive consequences would require recusal since always there are competitive repercussions. The competition must be direct (head to head) and the decision must affect the interest directly not as a result of the effect on the health of the industry. (see below)

- A business or interest owned by the Board member that relies on the health of the mining industry would not require the board member to recuse himself or herself. *Id.* (“A commenter stated that OSMRE’s proposal would allow a board member whose business relies on the health of the mining industry generally, to sit on board actions. OSMRE agrees...so long as the member’s interests do not constitute a direct or indirect financial interest in a surface coal mining operation.”). The fact that ACD will sell coal in the Utah market and may result in either a stronger or weaker industry that may help another industry or business is not a reason for recusal unless there are other factors that may result in a financial interest of the board member being affected more directly.
- The possibility that a precedent may be established that may affects an operator in which a member has an interest does not require a board member to recuse himself or herself from a matter in as long as the standard articulated in the rule is met. *See id.* (“a decision involves only one industry party, but the precedent to be established will affect other operators (including the operator in which the member has an interest).”). The Petitioners argue that all members of the board with an interest in coal mining in Utah or in other states are precluded by the

precedent effect of their decision from participating in the hearing. The OSM's discussion makes it clear that this was not the intended consequence of the rules but that the goal was to preserve boards with industry representation.

The foregoing examples provide guidance for board members, but each case will require the independent judgment of the board member with a goal to avoid conflicts that would tarnish the decision of the Board.

The Utah rules for judicial disqualification may also provide some guidance to the board members on when recusal may be necessary. A judge is required to enter a disqualification if he or she or a relative has an "economic interest" in the subject matter or if he or she or a relative has more than a *de minimis* interest that could be "substantially affected" by the proceeding.⁶ This standard is clearly broader than the recusal rule in the Coal Act, but provides some perspective on the rules for recusal in adjudicative settings. Unlike judges, who may request parties to waive disqualification,⁷ there is no provision allowing Board members to request a waiver of recusal. *See* Utah Admin. Code R. 645-101-100(130). Since there is not a provision allowing for waiver and since the board member is expected to have some interests and

⁶ Utah Code of Judicial Conduct Canon 3(E): (1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge had served as a lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than *de minimis* interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director, or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding; (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

⁷ *See* Utah Code of Judicial Conduct, Canon 3(F).

experience in the subject matters, the judicial standards could be considered more stringent than the standard that would apply to board members in a coal case⁸. Accordingly a board member may decide to not to recuse himself although as a judge he may have felt inclined to ask for the comfort of a waiver in order to avoid the appearance of impropriety.

The Utah Supreme Court has discussed some standards related disqualification bias in general non-coal administrative hearings. In *V-I Oil Co. v. Department of Environmental Quality*, the Utah Supreme Court indicated its approval of the principle that a disqualification bias in an administrative proceeding would be presumed where a personal pecuniary benefit existed. 939 P.2d 1192, 1198 (Utah 1997). In that case the Court eventually allowed an administrative officer to serve although there was an indirect financial benefit. The court noted that administrative hearings have a lesser standard for recusal particularly in non-criminal cases. The court stated that as a general rule a disqualification bias may be presumed from a prior manifested prejudice against a person or group of persons, or where an adjudicator has severe preconceived attitudes on points of law or policy. *Id.*

CONCLUSION

The forgoing discussion is intended to provide some guidance to board members as they consider whether they must recuse themselves from the proceeding. The Federal Register, states that the recusal rule is intended to ensure that “conflicts of interest will not taint the actions of State board members,” but the rules are also crafted to avoid the “dismantling of the boards.” 51 Fed. Reg. 37120. Because the requested certification is not required by law and is unnecessary,

⁸The mineral and oil and gas statutes and rules do not have express requirements mandating recusal in appropriate circumstances and arguably a board member could proceed with a hearing after a waiver is obtained for hearings that do not involve coal mining.

the Division opposes that part of Petitioners' motion requesting a particular "certification" from each Board member. Participation in the proceeding sufficiently signals to Petitioners each Board member's determination that he or she lacks indirect or direct financial interests that may be affected by the proceeding.

Respectfully submitted this 22 day of March, 2010



Steven F. Alder, (Bar No #0033)
Fredric J. Donaldson, (Bar No #12076)
Assistant Attorney General
Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Request for Agency Action, to be mailed by first class mail, postage prepaid, the 22 day of January, 2010 to:

Denise Dragoo
James Allen
SNELL & WILMER, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

Stephen H.M. Bloch
Tiffany Bartz
SOUTHERN UTAH WILDERNESS ALLIANCE
425 East 100 South
Salt Lake City, UT 84111

Walton Morris
MORRIS LAW OFFICE, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901

Sharon Buccino
NATURAL RESOURCES DEFENSE COUNCIL
1200 New York Ave., NW, Suite 400
Washington, DC 20005

Michael Johnson
1594 West North Temple Suite 300
Salt Lake City, UT 84116

William Bernard
Kane County Attorney
78 North Main Street
Kanab, UT 84741

A handwritten signature in blue ink, appearing to read "S. Allen", is written over a horizontal line.